LEE TEE & ANOR

v.

SEEK LAI NEO & ANOR

COURT OF APPEAL, KUALA LUMPUR
NH CHAN JCA
AHMAD FAIRUZ JCA
MOKHTAR SIDIN JCA
[CIVIL APPEAL NO: W-02-788 OF 1996]
10 DECEMBER 1999

CONTRACT: *Sale and purchase of property - Termination - Whether agreement for sale and purchase of property terminated - Whether notice of termination by vendor valid - Whether new agreement between vendor and new purchaser valid - Whether new purchaser was a bona fide purchaser - Whether knowledge of solicitor in land transaction imputed to client - Privity of contract*

The plaintiffs entered into a sale and purchase agreement ('the first agreement') with the first defendant to purchase a four-storey shophouse ('the property') at the price of RM300,000. The plaintiffs paid RM160,000 of the purchase price in accordance with the first agreement, and the balance of the purchase price of RM140,000 was to be paid in stages from a housing loan obtained from Bank Bumiputra Malaysia Bhd. Although the loan documents and the charge had been executed by the plaintiffs, the first defendant did not execute the memorandum of transfer to enable the loan transaction to be completed despite requests from the plaintiffs' solicitors. The plaintiffs subsequently discovered that the first defendant had entered into another sale and purchase agreement ('the second agreement'), and thus commenced proceedings seeking, *inter alia*, specific performance of the first agreement, which the High Court granted. The plaintiffs also discovered that the first defendant had been wound up by the High Court and that it had transferred the property to the second and third defendants. The plaintiffs then filed an originating summons seeking, *inter alia*, a declaration that the transfer be declared null and void. The judge entered judgment against the first defendant when the first defendant or the official receiver failed to file a defence or appear in court. The official receiver filed an application to set aside the judgment in default but the application was dismissed. The official receiver did not appeal. The trial judge heard the originating summons and allowed the plaintiffs' application and dismissed the counterclaim of the second and third defendants. Dissatisfied, the second and third defendants appealed.

Held:
Per Mokhtar Sidin JCA

[1] The first defendant had failed to challenge the validity of the first agreement; it was not open to the second and third defendants to challenge its validity since they were not parties to the first agreement. The High Court had decided that the plaintiffs were entitled to specific performance of the first agreement. It would not be correct for the judge to hold otherwise. To do so would result in two conflicting orders being made.

[2] The letter which was deemed to be a notice of demand by the defendants could not be an effective notice because it was not sent by AR registered post as required by cl 9(2) of the first agreement.

[3] There was no evidence by the first defendant that the payments were not received or that the payments received were without prejudice or that the payments were returned. The failure on the part of the first defendant to do so had nullified the notice of demand. Though the first defendant had been precluded from defending, there was nothing to stop the second and third defendants from calling any director or officer of the first defendant to give evidence in court as to this. The failure to do so on the part of the defendants would mean that the evidence of the plaintiffs was unchallenged. The notice of demand was also bad because the amount demanded was not correct but was in excess of the amount actually due.

[4] In view of the finding that the first agreement was still subsisting it was unlawful for the first defendant to enter into the second agreement with the second and third defendants in respect of the same property. It was clear that the second agreement was not lawful and should be set aside.

[5] The knowledge of a solicitor is regarded in law as the knowledge of the client except where the solicitor acts fraudulently. In this case, since the solicitor had knowledge of the first agreement, the second and the third defendants were deemed to have had knowledge of the existence of the first agreement; as such they were not *bona fide* purchasers without notice.

[Second and third defendants' appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Pihak responden-reponden ('plaintif-plaintif' di mahkamah tinggi) telah memasuki satu perjanjian jualbeli ('perjanjian pertama') bersama dengan defendan pertama untuk membeli rumah kedai empat tingkat ('hartanah tersebut') dengan harga RM300,000. Plaintif-plaintif telah membayar wang sejumlah RM160,000 dari harga jualan sebagaimana yang diperuntukkan di dalam perjanjian pertama tersebut dan baki harga jualan sebanyak RM140,000 akan dibayar secara berperingkat oleh plaintif-plaintif dari pinjaman perumahan yang telah diperolehi dari Bank Bumiputra Malaysia Bhd. Walaupun dokumen-dokumen pinjaman dan gadaian telah disempurnakan oleh plaintif-plaintif, defendan pertama gagal untuk menandatangani Borang Pindahmilik supaya transaksi pinjaman dapat disempurnakan walaupun telah diminta untuk berbuat demikian oleh peguam plaintif-plaintif. Kemudiannya, plaintif-plaintif mendapat tahu bahawa defendan pertama telah memasuki perjanjian jualbeli yang lain bersama dengan defendan-defendan kedua dan ketiga ('perjanjian kedua') dan seterusnya memulakan tindakan terhadap defendan pertama memohon, *inter alia*, pelaksanaan spesifik di bawah perjanjian pertama. Plaintif-plaintif berjaya mendapatkan perintah pelaksanaan spesifik terhadap defendan pertama di bawah perjanjian pertama. Plaintif-plaintif juga mendapat tahu bahawa defendan pertama telah digulungkan oleh Mahkamah Tinggi dan bahawa defendan pertama telah mendaftarkan pindahmilik hartanah tersebut kepada defendan kedua dan ketiga. Plaintif-plaintif memfailkan saman pemula di mahkamah memohon, *inter alia*, satu perisytiharaan membatalkan pendaftaran pindahmilik tersebut. Hakim yang bijaksana telah memasukkan penghakiman terhadap defendan pertama apabila defendan pertama atau pegawai penerima gagal untuk memfailkan pembelaan dan menghadiri perbicaraan di mahkamah. Pegawai penerima kemudiannya memfailkan permohonan untuk mengenepikan penghakiman tersebut tetapi permohonan itu telah dibuang. Pegawai penerima tidak merayu terhadap keputusan tersebut. Hakim yang bijaksana telah mendengar saman pemula, dan membenarkan permohonan plaintif-plaintif tetapi menolak tuntutan balas defendan-defendan kedua dan ketiga. Defendan-defendan kedua dan ketiga merayu terhadap keputusan tersebut.

Diputuskan:
Oleh Mokhtar Sidin HMR

[1] Defendan pertama gagal untuk mempertikaikan keesahan perjanjian pertama dan oleh yang demikian defendan-defendan kedua dan ketiga tidak mempunyai hak untuk mempertikaikan keesahan perjanjian pertama itu memandangkan mereka bukanlah pihak kepada perjanjian tersebut. Mahkamah Tinggi telah memutuskan bahawa pihak plaintif

berhak untuk relif perlaksanaan spesifik di bawah perjanjian pertama itu. Adalah tidak betul sekiranya hakim bijaksana di dalam tindakan ini memutuskan sebaliknya. Sekiranya mahkamah berbuat demikian, ini akan mengakibatkan dua perintah yang bercanggah diputuskan.

[2] Notis yang dianggap sebagai notis tuntutan oleh defendan-defendan adalah tidak efektif memandangkan notis itu tidak disampaikan melalui pos berdaftar AR sebagaimana yang diperuntukkan di bawah klausa 9(2) dalam perjanjian pertama tersebut.

[3] Defendan pertama tidak menunjukkan sebarang bukti bahawa bayaran-bayaran yang berkenaan tidak diterima atau diterima tanpa prasangka atau dikembalikan. Kegagalan pihak defendan pertama untuk berbuat demikian mengakibatkan notis tuntutan tersebut terbatal. Walaupun defendan pertama tidak dibenarkan untuk memasukkan pembelaannya, tidak ada apa-apa yang menghalang defendan-defendan kedua dan ketiga daripada memanggil sebarang pengarah atau pegawai defendan pertama untuk memberi keterangan di mahkamah ini. Kegagalan pihak defendan-defendan untuk berbuat demikian bermakna keterangan plaintif-plaintif tidak dipertikaikan. Berdasarkan kepada alasan tersebut, notis yang didakwa oleh defendan-defendan sebagai notis tuntutan adalah tidak terpakai memandangkan jumlah yang dituntut adalah salah kerana ia berlebihan dari jumlah yang sebenar.

[4] Berdasarkan kepada pendapat mahkamah bahawa perjanjian pertama masih berkuatkuasa, adalah menyalahi undang-undang bagi defendan pertama untuk memasuki perjanjian kedua bersama dengan defendan-defendan kedua dan ketiga. Adalah jelas bahawa perjanjian kedua tidak sah dan patut diketepikan.

[5] Pengetahuan oleh peguambela dianggap dalam undang-undang sebagai pengetahuan oleh anakguam, kecuali di mana peguambela bertindak dengan fraud. Di dalam kes ini, memandangkan peguambela mempunyai pengetahuan mengenai perjanjian pertama, maka defendan-defendan kedua dan ketiga dianggap sebagai mempunyai pengetahuan mengenai perjanjian pertama tersebut dan oleh yang demikian mereka bukanlah pembeli *bona fide* tanpa notis.

[Rayuan defendan kedua dan ketiga ditolak.]

Case(s) referred to:
Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors [1995] 3 CLJ 639 ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 91, 92
National Land Code 1965, s. 340

For the appellants - Harpal Singh Grewal (Avinder Singh Gill with him); M/s AJ Ariffin, Yeo & Harpal

For the respondents - RR Sethu (GC Ng & YS Leong with him); M/s Low Hop Bing, Koh Kong & Assoc

[Appeal from High Court, Kuala Lumpur; Originating Summons No: R1-24-05-1991]

Reported by Farah Naim

JUDGMENT

Mokhtar Sidin JCA:

We have dismissed the appeal by the appellants earlier. Now, we give our reasons for doing so.

In this appeal the appellants (the second and third defendants in the court below) appealed against the decision of the High Court, Kuala Lumpur which decided in favour of the respondents (the plaintiffs in the court below). In order to avoid any confusion we will refer to the parties as they were in the court below.

The plaintiffs, by a sale and purchase agreement dated 7 January 1984 (hereinafter referred to as the first agreement) agreed to purchase and the first defendant agreed to sell a 4-storey shophouse to be built on Lot H.S.(D) 10748 MLO 6445 Mukim Plentong, Daerah Johor Bahru, Johor (hereinafter referred to as the said property) at the price of RM300,000. The plaintiffs had paid a total sum of RM160,000 of the purchase price in accordance with the Third Schedule of the agreement. The balance of RM140,000 (hereinafter referred to as the balance purchase price) were to be paid in stages by the plaintiffs from a housing loan to be obtained by them from a financial institution. By a letter dated 25 August 1984, Bank Bumiputra Malaysia Berhad approved a loan application in the sum of RM140,000 by both plaintiffs. It is to be noted that the loan agreements and the charge instruments had been duly executed by both plaintiffs. By a letter dated 16 November 1984 solicitors for the first defendant, Messrs. Arthur Lee & Company informed the plaintiffs' solicitors, Messrs. Abdul Razak Ahmad, that the memorandum of transfer of the said property to the plaintiffs was being prepared. This was in response to two letters dated 6 November 1984 and 14 November 1984 from Messrs. Abdul Razak Ahmad. Pending the completion of the said transfer the plaintiffs entered a private caveat on the said property on 7 November 1984. By a letter dated 21 December 1984, Messrs. Abdul Razak Ahmad provided all the relevant documents pertaining to the transfer to the first defendant with the request that the first defendant do complete and execute the documents

and return them forthwith together with the title of the property. The first defendant failed or refused to comply with the said request.

The plaintiffs subsequently came to know that the first defendant had on 14 November 1984 entered into another sale and purchase agreement (hereinafter referred to as the second agreement) in respect of the said property with the second and third defendants whereby the said property was sold to the second and third defendants. On discovering this the plaintiffs filed a writ of summons dated 24 April 1985 in the High Court at Johor Bahru (Civil Suit No. 303-1985) against the first defendant seeking, *inter alia*, for specific performance of the first agreement. On 17 July 1985, the High Court at Johor Bahru issued an interim order stopping the second and third defendants from taking possession of the said property pending the disposal of Civil Suit No. 308-1985. On 1 February 1989, the plaintiffs succeeded in obtaining an order against the first defendant for specific performance of the first agreement. Copies of the interim order and the judgment for specific performance and also the order of the court in respect of this were served on all the three defendants. The three defendants did not take any step to set aside the order or appeal against that judgment.

The new solicitors for the plaintiffs, Messrs. Low Hop Bing, Koh Kong & Associates, sent the memorandum of transfer coupled with the orders and judgment stated above to the first defendant with the request that the first defendant do execute the memorandum of transfer. To date the first defendant had failed to do so. Attempts by the plaintiffs to effect the transfer from the first defendant and the relevant authorities failed. Sometime in August 1989, the plaintiffs discovered that the first defendant had been wound-up by the High Court at Johor Bahru *vide* Winding Up Petition No. 42-146-1987. The order to wind up the first defendant was dated 17 August 1988. The assistant official receiver was informed of the claim by the plaintiffs when copies of the order and judgment were sent to the official receiver. Sometime in January 1991 the plaintiffs discovered that the first defendant had on 19 December 1990 effected transfer of the said property to the second and third defendants by Transfer No. 54463/90. The transfer was effected as soon as the caveat entered by the plaintiffs expired. All those were done without the knowledge and consent of the official receiver. It was alleged by the plaintiffs that the second and third defendants had conspired with the first defendant to execute the said transfer which was purportedly done pursuant to the second agreement.

The plaintiffs then took up the present action (Originating Summons No. R1-24-05-1991) in court seeking a declaration that the transfer No. 54463/90 dated 19 December 1990 to be declared null and void and of no effect. As such the transfer should be set aside and the second and third defendants were to surrender the title of the said property to the plaintiffs. Alternatively, the plaintiffs seek an order that the High Court did order the order dated 1 February 1989 made by the High Court, Johor Bahru to take effect and the official receiver on behalf of the first defendant do execute the memorandum of transfer in favour of the plaintiffs or alternatively the Senior Assistant Registrar, High Court to be empowered to execute the transfer. The plaintiffs in the same application undertook to pay the balance of the purchase price amounting to RM140,000 under the first agreement to the official receiver. In the same application the plaintiffs also prayed that the court give an order that the second and third defendants deliver vacant possession of the said property to the plaintiffs.

From the record it is clear that the first defendant or the official receiver on his behalf did not file any defence to the plaintiffs' claim. The second and third defendants in their defence denied the plaintiffs' claim and put the burden on the plaintiffs to prove the claim. In their defence the defendants claimed the first agreement was terminated by the first defendant on 17 July 1984, that was on the failure of the plaintiffs to pay the balance of the purchase price. Because of the termination, the second agreement between the first and the second and third defendants is valid and enforceable. It was contended by the second and third defendants that the transfer under the second agreement could not be registered because of the private caveat entered by the plaintiffs and on its removal the transfer was effected. The second and third defendants thereby counterclaimed against the plaintiffs for the losses which they had suffered when they were unable to register the transfer because of the caveat.

The learned trial judge had on 1 October 1996 entered judgment against the first defendant when the first defendant or the official receiver failed to file the statement of defence and not appearing in court on the hearing date. Subsequently, the official receiver filed an application to set aside the judgment in default but the application was dismissed. The official receiver did not appeal against that decision. The learned judge went on to hear the originating summons against the second and third defendants and at the end of it the plaintiffs' application was allowed and the counterclaim by the second and third defendants was dismissed.

Being dissatisfied with the decision of the learned judge, the second and third defendants appealed to us. Hence the present appeal.

In his judgment, the learned trial judge stated that two issues were raised before him at the trial:

> (i) whether the plaintiffs had any interest on the said property in view of the pleading by the second and third defendants that the first defendant had terminated the first agreement before entering into the second agreement; and
>
> (ii) whether the second and third defendants were *bona fide* purchasers without notice of the plaintiffs' interest.

The learned trial judge decided in favour of the plaintiffs on the first issue when he held that the first agreement was not terminated and is still valid and effective. In his judgment the learned judge stated that the first defendant or the official receiver did not file their statement of defence and as such they failed to challenge the validity of the first agreement. He held that the first agreement was entered by the first defendant and the plaintiffs. The first defendant failed to challenge the validity of that agreement, it was not opened to the second and third defendants to challenge its validity since they were not parties to the agreement. Further, on the evidence adduced before him especially the evidence that the High Court, Johor Bahru in Civil Suit No. 308-1985 had decided on 1 February 1989 that the plaintiffs were entitled to specific performance of the first agreement, clearly indicated that the first agreement was still valid and effective. Though the judgment was served on all three defendants, no appeal or attempt was made by any of the defendants to set aside that judgment. In our view it would not be correct for the learned judge in the present action to hold otherwise. To do so would result in two conflicting orders being made. Despite that the learned judge went on to consider the merits based on the evidence adduced by the parties in particular the evidence of DW1 (Arthur Lee Meng Kwang). This witness was the solicitor for the first defendant at the material times. He gave evidence that on the instruction of the first defendant he sent a letter dated 17 July 1984 stating that the plaintiffs were in arrears in the sum of RM60,000 and interest thereon of the purchase price of the said property. The letter also stated that failure to pay the said sum would render the first agreement to be terminated and invalid. From the evidence it is not disputed that the letter was sent only to the first plaintiff and not to the second plaintiff. This letter was sent pursuant to cl. 9(2) of the first agreement which provides as follows:

> (2) If the Purchaser fails to comply with any of the terms of this Agreement or if any of such unpaid instalments and interest remain unpaid for any period in excess of twenty-eight (28) days after its due date, the Vendor shall give the Purchaser or his Solicitors not less than fourteen (14) days

notice in writing by A.R. Registered post to treat this Agreement as having been repudiated by the Purchaser and unless in the meanwhile such default and/or breach alleged is rectified or such unpaid instalments and interest are paid, this Agreement shall, at the expiration of the said notice, be deemed to be annulled.

For the sake of completeness the letter dated 17 July 1984 reads as follows:

Date: 17-7-1984

Madam Seek Lai Neo
82, Taman Tiram Baru
Ulu Tiram
Johor.

Dear Madam

Re: Purchase of H.S.(D) 10748 MLO 6445 Mukim Plentong – Cheng Chuan Dev. Sdn Bhd

The above matter refers.

We are instructed that progressive payments in the sum of $60,000.00 towards the purchase of the above said property has been due and owing to our clients for more than 28 days of its due date as follows:

NOTICE DATED	AMOUNT	DUE DATE
31/1/1984	$68,000.00 being balance payment on reinforced concrete framework, walls, doors & windows frames.	14/2/84
30/4/1984	$30,000.00 internal and external plastering	14/5/84
LESS PAYMENT ON 22/5/1984	$38,000.00	
BALANCE PAYABLE	$60,000.00	

Pursuant to clause 8 of your Sale & Purchase Agreement interest is chargeable on delayed progressive payments at the rate of 10% per annum.

We had by an A.R. Registered letter dated the 17th July, 1984 issued a notice to you requesting payment of the balance of purchase price in the sum of $98,000.00. However our clients have upon rechecking their records instructed us that the balance due and owing to date is only in the sum of $60,000.00 together with interest thereon. As such kindly disregard our earlier letter.

a TAKE NOTICE that unless the said sum of $60,000.00 together with interest thereon at the rate of 10% per annum is paid either directly to our clients or to us as solicitors within 14 days of the date hereof the Sale & Purchase Agreement shall be treated as repudiated by yourself pursuant to clause 9(2) of the same and be deemed to be annualled without further reference to you.

b Yours faithfully

Sgd.

c.c. Cheng Chuan Dev. Sdn. Bhd.

c The learned judge found that this letter did not comply with cl. 9(2) of the first agreement on the following grounds:

(i) the letter was addressed only to the first plaintiff and not to the second plaintiff; and

d (ii) the letter which was sent to the first plaintiff was not sent by A.R. registered post.

Since that letter was not addressed and sent to the second plaintiff who was a joint purchaser under the first agreement and also the fact that the letter was not sent by A.R. registered post as required by cl. 9(2), the e notice of termination purportedly to be in that letter was bad in law. In our view these were findings of facts by the learned judge. As such we are not in a position to disturb those findings. The learned judge then went on to say that since the notice did not comply with cl. 9(2) it was bad in law and he went on to hold that the termination notice was defective and f ineffective. He held that the first agreement was still valid and effective. We see no reason to disturb the findings of the learned judge. We wish to add further here that the notice of demand referred to in the letter stated above was a notice of demand sent by the same solicitor on the same date to the first plaintiff. That notice of demand was a demand for the sum of g RM98,000 which was in excess of the sum indicated in the above letter. It is clear to us that the above-stated letter was sent subsequent to the notice of demand because the notice of demand was referred to in the above-stated letter. The above-stated letter also informed the first plaintiff to ignore the notice of demand issued earlier. For all intents and purposes h that notice of demand is deemed to be invalid on the request of the first defendant themselves. That being the case the above-stated letter which was deemed to be a notice of demand by the defendants could not be an effective notice because it was not sent by A.R. registered post as required by cl. 9(2) of the first agreement. The learned judge was right in holding i so.

The above-stated letter clearly shows the amount of the progressive payments due from the plaintiffs as of 22 May 1984. From the evidence it is clear that the plaintiffs had made three payments amounting to RM25,000. The payments were made on 1 June 1984, 8 June 1984 and 15 June 1984. These payments were acknowledged by the first defendant with the issuance of temporary receipts. Since the above-stated letter was dated 17 July 1984, it is clear to us that those amounts were not taken into account. Assuming that the letter was a notice of termination it is clear to us the amount due demanded in that letter could not be correct. On the other hand, if the amount due was as on 22 May 1984 as stated in the letter then the acceptance of those payments by the first defendant would act as a waiver. There was no evidence by the first defendant that the payments were not received or the payments received were without prejudice or that those payments were returned. The failure on the part of the first defendant to do so would warrant the above-stated letter as notice of demand being nullified. Though the first defendant had been precluded from defending, there was nothing to stop the second and third defendants from calling any director or officer of the first defendant to give evidence in court as to this. Failure to do so on the part of the defendants would render the evidence of the plaintiffs to be unchallenged. For that reason the above-stated letter claimed by the defendants to be the notice of demand would be bad because the amount demanded was not correct because it was in excess of the amount actually due.

The next point to consider is, did the first defendant and the plaintiffs accept the fact that there was termination as indicated by the letter dated 17 July 1984 which as alleged by the defendants to be effective fourteen days after the date of that letter? For that purpose we would like to refer to several correspondences between the plaintiffs and the first defendant. The first letter was from Messrs. Abdul Razak Ahmad to Messrs. Arthur Lee & Company which reads as follows:

6th November 1984

M/s. Arthur Lee & Co.
Advocates & Solicitors
Merlin Tower
Johor Bahru.

Dear Sirs,

Purchase of H.S.(D) 10748 MLO 6445 Mk. Plentong

I act for Mdm. Seek Lai Neo and Mr. Koh Horng Jyh and I am instructed that you act for Cheng Chuan Development Sdn. Bhd., the developers.

I am instructed that my clients have entered into an agreement dated 7th January 1984 with your clients for the purchase of the above property.

My clients have to-date paid $160,000.00 to your clients. My clients have obtained loan facilities in the sum of $140,000.00 from Bank Bumiputra Malaysia Berhad, Kota Tinggi Branch.

I shall be pleased if you will let me know when is the balance of the purchase price due to your clients.

Yours faithfully,

Sgd.

c.c. Md. Seet Lai Neo & Ano.

This letter was sent some three months after the purported termination informing the first defendant the plaintiffs had secured a loan from Bank Bumiputra Malaysia Berhad to pay the balance of the purchase price. The letter also requested for the first defendant to inform the plaintiffs of the due date to pay the balance of the purchase price. The reply dated 9 November 1984 reads as follows:

9-11-84

M/s. Abdul Razak Ahmad
Advocate & Solicitor
4th Floor, Malayan Banking Building
Johor Bahru.

Dear Sir,

RE: H.S.(D) 10748 for MLO 6445, Mukim Plentong

Your letter dated 6th November, 1984 refers.

Please be informed that we are acting for both the Developer and the Purchasers in respect of the sale and purchase of the above property.

As to paragraph 4 of your said letter, we are writing to the Developer and shall revert to you in due course.

Yours faithfully,

Sgd.

c.c. Madam Seek Lai Neo & Anor.
c.c. M/s. Cheng Chuan Development Sdn. Bhd.

As can be seen from the reply, as on that date Messrs. Arthur Lee & Company was still acting for both the first defendant and the plaintiffs. There was no indication whatsoever from Messrs. Arthur Lee & Company that the first agreement had been terminated. Yet the same person came to court as DW1 and gave evidence that the first agreement had been terminated by the letter dated 17 July 1984. In our view if the first agreement had been effectively terminated he could not have acted for the plaintiffs anymore for they had ceased to be the purchasers. On 14 November 1984, Messrs. Abdul Razak Ahmad again wrote to Messrs. Arthur Lee & Company which reads as follows:

> Dear Sirs,
>
> **H.S.(D) 10748 MLO 6445 Mukim of Plentong**
>
> I refer to your letter dated 9th November 1984 and wish to inform you that I have been instructed by the Purchasers to act for them in your stead.
>
> Please let me know whether you have any objections, if not, kindly forward all the relevant documents to me as soon as possible on my undertaking to protect your lien for costs.

The reply to this letter from Messrs. Arthur Lee & Company was dated 16 November 1984 which reads:

> Dear Sir,
>
> **RE: H.S.(D) 10748 for MLO 6445, Mukim Plentong**
>
> Your letter dated 14th November, 1984 refers.
>
> We write to inform that we have no objections to your acting for the Purchasers in our stead.
>
> As we have completed up to the stage of the preparation of the Memorandum of Transfer, please let us have the sum of $905.50 ($857.50 – being equivalent to 1/2 legal costs for preparing the Sale & Purchase Agreement and the Memorandum of Transfer executed by our mutual client, $18.00 – stamp fee for the Agreement and $30.00 – trunk calls, miscellaneous & incidentals) less the sum of $200.00 being our costs and disbursements in respect of the Transfer and a further sum of $330.00 ($250.00 – legal costs for preparing the Deed, $40.00 – stamp fee for Deed and $30.00 – miscellaneous and incidentals) being our costs and disbursements for the preparation of the Deed.
>
> Upon receipt of your cheque for the total sum of $1,035.50 we shall forward to you a copy each of the Sale and Purchase Agreement and the Deed together with the duly executed and attested Memorandum of Transfer by the Purchasers.

A copy of this letter was sent to the first defendant and also to the plaintiffs. In that letter Messrs. Arthur Lee & Company informed Messrs. Abdul Razak Ahmad the amount to be paid by the plaintiffs for the discharge which include preparation of the memorandum of transfer, stamp fee, deed of transfer and other disbursements. This letter also indicated that the transfer instruments had been prepared which in our view is an indication that the parties concerned had not terminated the first agreement and it was still subsisting. Yet DW1 came to court and gave evidence stating that the first agreement had been terminated which contradicted those letters. Sections 91 and 92 of the Evidence Act are applicable to this piece of evidence.

For the above reasons we agree with the learned trial judge that the first agreement is still valid and the notice of termination dated 17 July 1984 was of no effect.

The learned trial judge then went on to consider the forfeiture by the first defendant of the sum already paid by the plaintiffs for the purchase. In his judgment the learned trial judge referred to cls 9(ii) and 9(iii) of the first agreement. Under those clauses the first defendant is entitled to forfeit only 10% of the total purchase price. The total purchase price of the said property under the first agreement was RM300,000. As such the learned judge found that the first defendant was entitled to the sum of RM30,000 from the total sum paid by the plaintiffs. The balance of the money paid was to be returned to the plaintiffs on the termination of the agreement. There was no dispute that the plaintiffs had paid the sum of RM160,000. It is imperative on the part of the first defendant to refund the sum of RM130,000 when the first defendant terminated the first agreement. Thus, if the first defendant had terminated the first agreement two weeks after 17 July 1984, no refund of the sum of RM130,000 to the plaintiffs was ever made until today. As can be seen the first defendant was wound up only on 17 August 1988 and as such there were no hinderances whatsoever for the first defendant to make the refund from 17 July 1984 to 17 August 1988. We agreed with the learned judge that the irresistible conclusion was that the first agreement was not terminated and if there was termination it was not effective.

In view of the finding that the first agreement was still subsisting it was unlawful for the first defendant to enter into the second agreement with the second and third defendants in respect of the same property. It is clear to us that the second agreement was not lawful and should be set aside.

In the present appeal the second and third defendants pleaded that they were *bona fide* purchasers without notice and thus protected by s. 340 of the National Land Code. The learned judge dealt with this point based on the evidence adduced before him. The learned judge in his judgment stated that the solicitors who was acting for the second and third defendants at the time when the second agreement was prepared, Mr. Lim Seng Bok (DW2), admitted that he knew there was in existence a sale and purchase agreement between the first defendant and the plaintiffs in respect of the same property. The learned judge went on to say that by reason of the decision of *Aik Ming (M) Sdn. Bhd. & Others v. Chang Ching Chuen & Ors*. [1995] 3 CLJ 639; [1995] 2 MLJ 770 it is settled law that the knowledge of a solicitor is regarded by law as the knowledge of the client except where the solicitor acted fraudulently. The learned judge found that since the solicitor had knowledge of the first agreement, the second and third defendants were deemed to have knowledge of the existence of the first agreement. It is up to the parties then to make the necessary search and enquiries that the first agreement had been effectively terminated. Otherwise, the learned judge was of the view that the parties were not protected by the doctrine of *bona fide* purchasers. For that reason the learned judge found that the second and third defendants were not *bona fide* purchasers without notice. Though the decision of *Aik Ming* had been reversed by the Federal Court, the principle referred to by the learned judge was affirmed.

We have gone through the judgment of the learned trial judge and we could not find any fault or error in the reasoning given by him. We are also satisfied that the learned judge had properly appreciated the evidence adduced. As such we dismissed the appeal with costs. The deposit is to be paid to the respondents towards account of taxed costs.